

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

KEVIN D. WALKER,

Petitioner,

v.

BEN CURRY, Warden

Respondent.

Civil No. 07-1925 WQH (BLM)

**ORDER DISMISSING CASE  
WITHOUT PREJUDICE AND WITH  
LEAVE TO AMEND**

Petitioner, a state prisoner proceeding pro se, has filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254, but has failed to pay the \$5.00 filing fee and has failed to move to proceed in forma pauperis.<sup>1</sup>

**FAILURE TO SATISFY THE FILING FEE REQUIREMENT**

Because this Court cannot proceed until Petitioner has either paid the \$5.00 filing fee or qualified to proceed in forma pauperis, the Court **DISMISSES** the case without prejudice. See Rule 3(a), 28 U.S.C. foll. § 2254. If Petitioner wishes to proceed with this case, he must submit, **no later than December 11, 2007**, a copy of this Order with the \$5.00 fee or with adequate proof of his inability to pay the fee.

///

///

---

<sup>1</sup> The petition was originally filed with United States Court of Appeals for the Ninth Circuit on August 6, 2007. The Ninth Circuit ordered the case transferred to this Court on October 1, 2007.

## FAILURE TO ALLEGGE EXHAUSTION

2 Additionally, the petition must be dismissed because Petitioner has failed to allege  
3 exhaustion of state judicial remedies. Habeas petitioners who wish to challenge either their state  
4 court conviction or the length of their confinement in state prison, must first exhaust state  
5 judicial remedies. 28 U.S.C. § 2254(b), (c); *Granberry v. Greer*, 481 U.S. 129, 133-34 (1987).  
6 To exhaust state judicial remedies, a California state prisoner must present the California  
7 Supreme Court with a fair opportunity to rule on the merits of every issue raised in his or her  
8 federal habeas petition. 28 U.S.C. § 2254(b), (c); *Granberry*, 481 U.S. at 133-34. Moreover,  
9 to properly exhaust state court remedies a petitioner must allege, in state court, how one or more  
10 of his or her federal rights have been violated. The Supreme Court in *Duncan v. Henry*, 513  
11 U.S. 364 (1995) reasoned: “If state courts are to be given the opportunity to correct alleged  
12 violations of prisoners’ federal rights, they must surely be alerted to the fact that the prisoners  
13 are asserting claims under the United States Constitution.” *Id.* at 365-66 (emphasis added). For  
14 example, “[i]f a habeas petitioner wishes to claim that an evidentiary ruling at a state court trial  
15 denied him [or her] the due process of law guaranteed by the Fourteenth Amendment, he [or she]  
16 must say so, not only in federal court, but in state court.” *Id.* at 366 (emphasis added).

17       Nowhere on the Petition does Petitioner allege that he raised his claims in the California  
18 Supreme Court. In fact, he specifically indicates he did not seek review in the California  
19 Supreme Court. (*See* Pet. at 5-6.) If Petitioner has raised his claims in the California Supreme  
20 Court he must so specify. “The burden of proving that a claim has been exhausted lies with the  
21 petitioner.” *Matthews v. Evatt*, 105 F.3d 907, 911 (4th Cir. 1997); *see Breard v. Pruett*, 134 F.3d  
22 615, 619 (4th Cir. 1998); *Lambert v. Blackwell*, 134 F.3d 506, 513 (3d Cir. 1997); *Oyler v.*  
23 *Allenbrand*, 23 F.3d 292, 300 (10th Cir. 1994); *Rust v. Zent*, 17 F.3d 155, 160 (6th Cir. 1994).

24        Further, the Court cautions Petitioner that under the Antiterrorism and Effective Death  
25        Penalty Act of 1996 (AEDPA) a one-year period of limitation shall apply to a petition for a writ  
26        of habeas corpus by a person in custody pursuant to the judgment of a State court. The  
27        limitation period shall run from the latest of:

28 (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking

1 such review;

2 (B) the date on which the impediment to filing an application  
3 created by State action in violation of the Constitution or laws of the  
United States is removed, if the applicant was prevented from filing  
by such State action;

4 (C) the date on which the constitutional right asserted was  
5 initially recognized by the Supreme Court, if the right has been  
6 newly recognized by the Supreme Court and made retroactively  
applicable to cases on collateral review; or

7 (D) the date on which the factual predicate of the claim or  
8 claims presented could have been discovered through the exercise  
of due diligence.

9 28 U.S.C.A. § 2244(d)(1)(A)-(D) (West Supp. 2002).

10 The statute of limitations does not run while a properly filed state habeas corpus petition  
11 is pending. 28 U.S.C. § 2244(d)(2); *see Nino v. Galaza*, 183 F.3d 1003, 1006 (9th Cir. 1999).  
12 *But see Artuz v. Bennett*, 531 U.S. 4, 8 (2000) (holding that “an application is ‘properly filed’  
13 when its delivery and acceptance [by the appropriate court officer for placement into the record]  
14 are in compliance with the applicable laws and rules governing filings.”). However, absent some  
15 other basis for tolling, the statute of limitations does run while a federal habeas petition is  
16 pending. *Duncan v. Walker*, 533 U.S. 167, 181-82 (2001).

17 Rule 4 of the Rules Governing Section 2254 Cases provides for summary dismissal of a  
18 habeas petition “[i]f it plainly appears from the face of the petition and any exhibits annexed to  
19 it that the petitioner is not entitled to relief in the district court . . .” Rule 4, 28 U.S.C. foll.  
20 § 2254. Here, it appears plain from the Petition that Petitioner is not presently entitled to federal  
21 habeas relief because he has not alleged exhaustion of state court remedies.

## 22 CONCLUSION

23 Therefore, the Petition is **DISMISSED** without prejudice and with leave to amend for  
24 failing satisfy the filing fee requirement and failing to allege exhaustion of state judicial  
25 remedies. In order to have this case reopened, Petition must, **no later than December 11, 2007,**  
26 (1) either pay the filing fee or provide adequate proof of his inability to pay, **and** (2) file a First

27 / / /

28 / / /

1 Amended Petition, curing the pleading deficiency discussed above. For Petitioner's  
2 convenience, the Clerk of Court shall attach to this Order, a blank Southern District of  
3 California In Forma Pauperis Application and a blank First Amended Petition form.

4 **IT IS SO ORDERED.**

5 DATED: October 16, 2007

6   
7 WILLIAM Q. HAYES

8  
9  
10 United States District Judge

11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28